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Congress of the United States

House of Representatives

Washington, DC 20515

Statement of Representative Silvestre Reyes Chairman, House Permanent Select Committee on Intelligence American Bar Association Section of Litigation Annual Conference April 13, 2007

Thank you very much for that kind introduction.

The panel discussion that will follow my remarks is going to focus on "The First Amendment in Times of War and Peril." In my view, it is critical that the people and the press continue to have a voice even in times of war. But I would like to talk about the problems that arise when people in the government begin to lose their voice in the midst of a national crisis.

I don't think anyone here would be surprised to hear me say that our nation is facing great challenges in the national security realm. But when you go through the list of all the threats out there, it starts to sound more than a little daunting. There are pressing demands on the Intelligence Community to respond to these threats:

- Our men and women of the armed services have to go to work every day in war zones in Iraq and Afghanistan where they face danger from terrorists, warlords and sectarian forces. They are constantly being targeted, and they need information to protect them.
- Muslim populations in many parts of the world are coming under the influence of radical leaders who have been perverting their noble religion and pushing good people towards a militant view of Islam. We need to know what these people are planning and whether they intend to use violence.
- The leaders of Iran and North Korea are aggressively pursuing a nuclear capability. At the same time, other dangerous technologies are falling into the hands of government and private actors whose intentions are questionable at best. In both cases, we need information on the capabilities that these actors have developed and need to prevent them, to the best of our abilities, from getting any farther.
- And with the threat of terrorism growing, little attention is being paid to Russia and China. Although we have been building strategic partnerships with these old

adversaries, both governments have been very aggressive in trying to steal U.S. secrets. China has been particularly active pursuing access to critical U.S. technologies. We need to know what these governments are up to, and we need to protect our secrets.

- Similarly, more attention must be paid to Africa and Latin America. The Intelligence Community, and by extension the Committee, has focused much of its attention on the Near East over the past five years. It is, however, clear that the Committee must now help direct resources and attention to other areas of the world that impact U.S. national security interests. In fact, I traveled to the Horn of Africa this past February to investigate threats in this area, and am planning a similar trip to Latin America in the near future.

This list is really just the tip of the iceberg.

But the point I want to make is that our intelligence officers are responsible for protecting us against all of these threats. This is a big responsibility. Every single day, they go to work knowing that what they do could spell the difference between thwarting a terror attack and suffering another national tragedy.

That kind of pressure is well beyond what most of us will ever have to confront in our lifetimes. The problem is that, under such tremendous strain, good people will cut corners. They will do so with noble intentions. But the benefits of security should not have to come at the cost of undermining the very system of democracy we are trying to protect.

We have seen this unfortunate tradeoff come to light recently in connection with the investigatory work of the Federal Bureau of Investigation.

Last month, the Inspector General for the Department of Justice issued a report on the FBI's use of National Security Letters. The FBI uses National Security Letters -- often referred to as "NSLs" -- to obtain personal information from third parties, such as telephone companies, Internet Service providers, and consumer credit agencies. This information is collected in secret, and without a court warrant.

Since 2005 I have been extremely concerned about the use of NSLs. In particular, I have worried about the procedures and standards for issuing NSLs. That is what led me to join other Democrats from the House Intelligence Committee in introducing a bill in December 2005 that would address these shortfalls and require judicial approval of NSLs.

Let me explain a little about the source of my concern. Before 9/11, the legal standard for issuing an NSL was "specific and articulable" reasons to believe the records sought belonged to a terrorist or a spy. After 9/11, Congress rushed to pass the PATRIOT Act, and lowered that legal standard to require only that the information sought be "relevant" to an authorized investigation to protect against terrorism or clandestine intelligence.

Not surprisingly, this opened the floodgates.

- The number of NSLs requests increased dramatically. Starting from a mere 8,500 in 2000, the number ballooned all the way up to more than 56,000 in 2004.
- From 2003 through 2005, the FBI issued more than 140,000 NSLs.
- A group of 9 NSLs issued in one investigation sought information on more than 11,000 separate phone numbers.
- And the percentage of NSLs seeking information about U.S. persons went from 39 percent in 2003 to 53 percent in 2005.

We took a powerful investigative tool and made it easier to use. But, in so doing, we did not insert any provision for meaningful, independent oversight. The FBI was left to police itself, and, in the end, they took shortcuts in their effort to keep up with the demands of combating terrorism after 9/11.

In a report recently released by the Department of Justice Inspector General, the IG found a significant breakdown in the FBI's internal controls over NSLs.

- The FBI's record keeping was unreliable and significantly under-reported the total number of NSLs.
- They regularly issued so-called "exigent letters" – demanding business records on an emergency basis – when there was, in fact, no emergency.
- Their implementation and enforcement of the FBI's own internal rules for issuing NSLs was ineffective and resulted in as many as 3,000 violations of law and policy.
- FBI officials repeatedly failed to report these violations of law and policy to the Intelligence Oversight Board – as required by statute.
- And even when these violations were reported to supervisors, no action was taken.

But the most troubling part of this whole episode is that none of this would have come to light if Congress hadn't ordered the Department of Justice Inspector General to investigate the FBI's use of NSLs. It was only in the 2005 PATRIOT Act reauthorization that the Congress adopted a provision mandating this inspection.

In his testimony before the Senate Judiciary Committee last month, FBI Director Robert Mueller was asked whether the FBI would have uncovered these abuses without the Inspector General's investigation. His response was "I would hope that we would."

I don't know how optimistic that makes you feel, but my view is that we need more than just hope. I won't be comfortable until we bring congressional oversight, judicial oversight – or preferably both – into this process.

This story is a cautionary tale and a civics lesson all rolled into one.

This is what happens when checks and balances are pushed to the side. It is what happens when Congress rushes in to give the Executive Branch unfettered power in the name of “fighting terrorism.” And it is what happens when Congress does not do its job of keeping a close eye on the work of the government.

The Congress exists, in part, to ensure that the Executive Branch does not wield absolute power. To some, that may sound like a philosophy of obstruction, but it is a principle we ignore at our great peril.

This oversight role becomes much more challenging in a time of crisis. In the aftermath of 9/11, Congress passed important legislation to address the threats facing our nation, but it did so in haste. In the process, Congress decided that it would be better to give the Executive Branch unfettered authority and just hope for the best.

During the PATRIOT Act debates, and also during other more recent ones, we have heard the suggestion that that dissenting voices weaken our nation's resolve – and that we have strength only if no one makes any waves. But we seem to have forgotten that the power of unity comes from common purpose – not from silencing dissent.

In the absence of those dissenting voices, two branches of government fade into the background, and the Executive Branch is left to police itself.

The effects of this approach are becoming apparent in areas other than NSLs. The government is in the process of compiling vast databases of very personal information – your phone call records, your loan payments, your credit card purchases. And the information age places no limits on the volume of data or the length of time the government can hold on to it.

As an example, the FBI's Investigative Data Warehouse is a repository for information collected through investigations and intelligence operations. This is anything and everything that they can pull together, and the database is huge.

The total number of records in that database would make any privacy advocate flinch. It's an awful lot of personal information to have in the government's hands. But my concern is more of an operational one – being awash in so much information actually makes the job of protecting national security more difficult.

Let me explain that a little further. As many of you know, we have a terrorist watch list to keep potentially dangerous people off of airplanes. Although the actual number of

names on that list is classified, it's very large. Among all those people are a bunch of bad guys, but there are also lots more innocent people.

When you ask intelligence analysts to wade through an ocean of data, they are going to have a much harder time actually finding the bad guys. The more time and energy we spend sifting through mounds of irrelevant data on people we believe have done nothing wrong, the more likely we are to miss the relevant leads that could stop the next terrorist attack.

As someone who spent 26 and a half years in Law Enforcement prior to becoming a Member of Congress, I appreciate the importance of strong investigative tools. I want the FBI to have the authorities it needs to find terrorists.

But, unlike any other agency, the FBI has incredible power to intrude on the lives of others. With such power comes responsibility, and the FBI has failed to demonstrate that it is capable of exercising its power responsibly.

This doesn't mean we strip the FBI of these powers. But it does mean that we in the Congress and those in the Judiciary need to do our jobs and scrutinize the FBI and other agencies more closely.

And with respect to National Security Letters we are doing precisely that.

- We have called FBI and DoJ officials up to Capitol Hill to testify about the misuse of NSLs and pushed the Administration to hold appropriate personnel accountable.
- We have insisted that the FBI examine the internal management problems that led to these failures and fix those problems.
- We have asked the Justice Department's Inspector General carry his investigations farther so that we can get answers to some lingering questions.
- And we are exploring various legislative solutions to these problems, including the possibility of requiring the FBI to get approval of NSLs from a judge or magistrate – with, of course, an exception for emergency situations.

This is only the beginning, as we in the Congress reassert our role.

I don't think it would be controversial to suggest that Congress performs a vital function in government. The Executive Branch is responsible for carrying out the administrative and political functions of the government, but the Congress is responsible for making sure that it's done right, and that it's done within the confines of the law. We owe that to the people who elected us.

When the people give their trust to the government, it is not the Executive Branch alone that must respond. All three branches have the responsibility to make sure that the government as a whole lives up to the trust that the people have placed in it.

It was the absence of oversight that gave rise to this problem.

It was thanks to oversight that the problem came to light through the Inspector General's report.

And it will be through continued oversight that we will do what we can to make sure it doesn't happen again. That will require the Congress, the Judiciary, and the Executive all working together.

I'd like to leave you with a quote from former Supreme Court Justice William Douglas that ties my comments here together with ideas that will be discussed in the next panel:

"The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsion for restrained speech and thought against the abuses of liberty. They chose liberty."

And I would add that, just as the Framers chose liberty, they also chose a constitutional democracy that governs with more than one voice – knowing that it would be strong, even in times of crisis.

I thank you for your time and attention, and now I would be glad to take a few questions.